



U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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December 2, 2011

MEMORANDUM

TO: Members, Committee on Transportation and Infrastructure

FROM: Staff, Committee on Transportation and Infrastructure

RE: Hearing on "Restoring Jobs, Coastal Viability and Economic Resilience in the Gulf of Mexico: H.R. 3096, the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2011"

PURPOSE

On Wednesday, December 7, 2011, at 10:00 a.m. in 2167 Rayburn House Office Building, the Committee on Transportation and Infrastructure will hold a hearing to review H.R. 3096, the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2011 (RESTORE Act).

BACKGROUND

Explosion and Sinking of the DEEPWATER HORIZON

The DEEPWATER HORIZON was a dynamically positioned mobile offshore drilling unit (MODU) operated by Transocean Ltd. Transocean was under contract with British Petroleum (BP) to use the DEEPWATER HORIZON to drill an oil and natural gas well at the Macondo exploration site in an area of the Gulf of Mexico known as the Mississippi Canyon Block 252 (MC 252). BP purchased the lease rights to MC 252 in 2008 for \$34 million and became the legal "operator" for any activities on that block. For the purposes of the Macondo site, BP partnered with two other companies, Anadarko Petroleum Corporation and MOEX Offshore to drill the well. BP owns a 65 percent

share of the well, followed by 25 percent for Anardarko Petroleum, and 10 percent for MOEX Offshore.

On the evening of April 20, 2010, as workers were conducting integrity tests of the well, pressure readings indicated problems. At approximately 9:40 p.m., drilling mud began spewing into the DEEPWATER HORIZON followed shortly thereafter by natural gas. Efforts to close off the well by activating the rams and annular preventers on the blow out preventer failed. At 9:49 p.m. the first of two explosions occurred. Eleven workers who were aboard the MODU at the time of the blowout and explosion were killed. On April 22, 2010, the DEEPWATER HORIZON sank and oil and natural gas began spewing from the uncontained well. It took 87 days to secure the damaged blowout preventer and stop the flow of oil into the Gulf of Mexico. The Flow Rate Technical Group, established by the National Incident Commander during the response effort, estimated that 4.9 million barrels of oil were released during the spill (1 barrel of oil is equivalent to 42 gallons).

Oil Pollution Act of 1990

The Oil Pollution Act of 1990 (OPA) was enacted following the EXXON VALDEZ oil spill in 1989. OPA consolidated existing laws and enacted new provisions to create a comprehensive Federal legal framework to govern liability and bolster the national response to oil spills. OPA allows instant response to oil spills by ensuring that either the Coast Guard for marine spills, or EPA for land-based spills, has the authority to perform cleanup immediately using Federal resources, monitor the response efforts of the spiller (responsible party), or direct the responsible party's cleanup activities.

Responsible Party:

At the time of the DEEPWATER HORIZON oil spill, the MODU was operating in its capacity as an offshore facility. As such, the “responsible party” for the spill is defined under section 1001 of OPA as “the lessee of the area in which the facility is located...” As the lessees for the Macondo site, BP, Andarko Petroleum, and MOEX Offshore are the responsible parties for the DEEPWATER HORIZON oil spill. Transocean may also be considered a responsible party pending the outcome of the Department of Justice’s civil suit (see below).

Limits on Liability:

Under section 1002 of OPA, responsible parties are liable for all removal costs and specified damages that result from the release (or substantial threat of release) of oil. OPA defines eligible damages as including:

- injuries to natural resources;
- loss of personal property;

- lost revenues, profits and earning capacity resulting from destruction of property or natural resource injury;
- damages for loss of subsistence use of the resource; and
- costs of providing extra public services during or after spill response.

OPA provided limited defenses from liability, including an act of God, act of war, and act or omission of certain third parties. However, these defenses do not apply to a party who; (1) fails to report a spill; (2) fails to cooperate reasonably with officials responsible for removal activities; or (3) fails, without sufficient cause, to comply with a cleanup order.

Except for certain behavior, including acts of gross negligence or willful misconduct, OPA set liability limits for cleanup costs and other damages. However, OPA liability limits do not affect liabilities that may be owed under states' laws. The current OPA liability limits are as follows:

Single-Hulled Vessels	\$3,200/gross ton
Double-Hulled Vessels	\$2,000/gross ton
Other Vessels	\$950/ gross ton
Onshore Facility	\$350 million
Deepwater Port	\$350 million
Offshore Facility	Total of all removal costs plus \$75 million

MODUs, like the DEEPWATER HORIZON, are first treated as tank vessels for its liability cap. If removal and damage costs exceed this liability cap, a MODU is deemed to be an offshore facility for the excess amount.

In the case of the DEEPWATER HORIZON, BP is liable for all removal costs plus \$75 million. BP has publicly stated they will not exercise the \$75 million limit and will continue to pay "all legitimate claims" (see below). The \$75 million cap would not apply if the responsible parties are found grossly negligent, have engaged in willful misconduct, or violated a statute or regulation.

Oil Spill Liability Trust Fund:

Congress first authorized the use of the Oil Spill Liability Trust Fund (OSLTF) in OPA, and in complimentary legislation enacted a barrel tax on the oil industry to capitalize the fund. Pursuant to section 405 of the Emergency Economic Stabilization Act (P.L. 110-343), the OSLTF is currently funded through an industry-paid 8 cent per-barrel tax which is scheduled to rise to 9 cents per-barrel in 2017 before expiring at the end of 2017. The fund currently has a balance of approximately \$2.3 billion.

Under section 1012 of OPA, the OSLTF is authorized to provide reimbursement for the following removal costs and damages:

- payment of costs for responding to and removing oil spills;
- payment of the costs incurred by the federal and state trustees of natural resources for assessing the impacts to natural resources caused by an oil spill, and developing and implementing the plans to restore or replace the injured natural resources;
- payment of individual claims for uncompensated removal costs, and for uncompensated damages (e.g., financial losses of fishermen, hotels, and beachfront businesses);
- payment for the net loss of government revenue, and for increased public services by a state or its political subdivisions; and
- payment of certain Federal administrative and operational costs, including Coast Guard oil spill research and development and operating expenses.

Under the OSLTF claims process, individuals seeking reimbursement for eligible costs must first attempt reimbursement from the responsible party. In the case of the DEEPWATER HORIZON incident, BP established a \$20 billion escrow fund, administered through the Gulf Coast Claims Center (GCCF) to pay claims arising from the oil spill (\$20 billion is neither a floor nor a ceiling). As of November 1, 2011, BP and the GCCF have paid more than 150,000 claims totaling more than \$5.9 billion to individuals and businesses affected by the spill. BP has paid an additional \$1.5 billion to federal, state, and local governments for response and removal costs, loss of revenue, increased public service costs and costs related to behavioral health services, oil spill related research, tourism, and seafood testing and marketing. Finally, BP has spent an additional \$14 billion on oil spill response, \$100 million on a Rig Worker Assistance Fund, \$10 million for a National Institute of Health long-term study on worker health, and has committed \$1 billion for early natural resource damages restoration projects (see below) and \$500 million to the Gulf of Mexico Research Initiative.

If the responsible party refuses to pay, or fails to provide sufficient payment within 90 days, individuals may seek reimbursement from the Coast Guard's National Pollution Funds Center (NPFC) which administers the OSLTF. Individuals who believe they are subject to reimbursement from the OSLTF due to the failure of the responsible party to pay, or provide sufficient payment, may apply to the OSLTF for reimbursement. However, they may not receive OSLTF reimbursement for damages already compensated by the responsible party. As of November 28, 2011, NPFC has received 1,578 claims from individuals and businesses. It has denied 1,497 and has 81 pending.

Current law limits the per incident exposure to the fund to \$1 billion, which includes no more than \$500 million for natural resource damages. Reimbursements of

expenses paid out of the OSLTF by the responsible party are not charged against the \$1 billion cap. As a result of the DEEPWATER HORIZON incident, the Coast Guard has paid approximately \$617 million in claims out of the OSLTF to date which count against the cap. BP has reimbursed the fund for almost all of that.

Natural Resources Damages:

Under OPA's Natural Resources Damage Assessment (NRDA) process, federal, state and tribal government officials known as "Trustees" survey and collect data on damages to natural resources occurring as a result of an oil spill. The Trustees develop a plan to restore, replace or rehabilitate the damaged natural resources. Under OPA, responsible parties are required to pay the costs of natural resources damages to the extent they do not exceed responsible parties' limit on liability. The responsible parties may contest the Trustees' plan in court. If a responsible party exercises its liability limit, or otherwise fails to pay for the cost of the NRDA process, the Trustees may seek reimbursement from the OSLTF.

In the case of the DEEPWATER HORIZON incident, the Trustees are currently in the preassessment phase of the NRDA process is ongoing and the restoration planning process recently began. It could be several years before a final plan is approved. To date, BP has dedicated \$1 billion to pay for immediate restoration activities approved by the Trustees and has publicly committed to paying remaining natural resource damages once the final plan from the Trustees is approved.

Clean Water Act

The Federal Water Pollution Control Act (commonly known as the "Clean Water Act" or "CWA") is the principal Federal statute for protecting navigable waters and adjoining shorelines from pollution. Since its enactment, the CWA has formed the foundation for regulations detailing specific requirements for pollution prevention and response measures. It also provides criminal, administrative, and civil penalties for violations of such regulations.

Section 309 of the CWA authorizes civil and criminal penalties for violations of Section 311. Criminal penalties may include fines of between \$2,500 - \$25,000 per day of violation, or by imprisonment for up to one year, or both. Civil penalties can reach as high as \$37,500 per day of violation.

Section 311 of the CWA is specifically aimed at preventing and responding to spills of oil and hazardous substances. In conjunction with OPA, Section 311 provides for spill prevention requirements, spill reporting obligations, and spill response planning and authorities. It regulates the prevention and response to accidental releases of oil and hazardous substances into navigable waters, on adjoining shorelines, or affecting natural resources belonging to or managed by the United States. Finally, it imposes strict, joint

and severable liability on any party that is responsible for the discharge (or substantial threat of discharge) of oil or a hazardous substance.

Section 311(b) authorizes EPA to assess Class I or Class II administrative penalties for violations of Section 311. A Class I penalty may be assessed in an amount of up to \$16,000 per violation, not to exceed \$37,500. A Class II penalty may be assessed in an amount of up to \$16,000 per day of violation, not to exceed \$177,500. Each violation may be tabulated on a daily basis.

Section 311(b) also makes the owner or operator of a vessel, onshore, or offshore facility who discharges oil or hazardous substances in violation of Section 311 subject to a civil penalty of up to \$37,500 per day of violation, or up to \$1,100 per barrel of oil discharged. In instances of gross negligence or willful misconduct, these penalties increase to a \$140,000 per day of violation, or up to \$4,300 per barrel discharged.

It is important to note that these penalties are in addition to removal and damages costs the responsible party is liable for under OPA. Therefore, the funds raised by penalties are not necessarily used to respond to the triggering incident. However, any penalties paid pursuant to Section 311, or criminal penalties paid pursuant to Section 309 that are the result of violations of Section 311 ***are to be paid into the OSLTF*** (See 26 U.S.C. §9509(b)(8)). Therefore, these penalties may be used to support response and restoration to future spills, oils spill research and development efforts, and other activities authorized under Section 1012 of OPA.

Pursuant to the Debt Collection Improvement Act of 1996 (31 U.S.C. 3701 note), CWA administrative and civil penalties are subject to periodic inflationary adjustments. The penalty schedule is available at 40 C.F.R. 19.4.

Court Case

On December 15, 2010, the Justice Department (DOJ) filed a civil suit on behalf of the United States against BP, Anadarko Petroleum, MOEX Offshore, Transocean, Triton (the owner of the DEEPWATER HORIZON), and Lloyd's (the insurer of the DEEPWATER HORIZON) in the U.S. District Court for the Eastern District of Louisiana (Case 2:10-cv-04536). The DOJ alleges that the defendants through acts of omission, negligence and/or willfull misconduct violated several federal regulations governing safe well drilling operations, best available drilling technology, and procedures to maintain control of the well.

The DOJ is seeking civil penalties under Section 311(b) of the CWA. Based on the estimate of 4.9 million barrels of oil spilled, the civil penalties could total between \$5.4 billion and \$21 billion per defendant (except Lloyds) depending on whether the Court finds the defendants' actions constituted gross negligence or willful misconduct. Lloyd's is being sued pursuant to Section 1016 of OPA for the amount of the Certificate of Financial Responsibility it issued the DEEPWATER HORIZON.

The DOJ is also seeking a declaratory judgment from the court affirming that the responsible parties' actions constitute gross negligence or willful misconduct with respect to Section 1004 of OPA. If the Court were to provide such judgment, the responsible parties would not be able to assert the \$75 million limit on liability in the future.

In addition to the civil case, the DOJ continues to pursue a criminal investigation of BP, Transocean, and Halliburton, which provided the cement to seal the well.

Mabus Report

On June 15, 2010, President Obama named Secretary of the Navy, Ray Mabus, to develop a long-term plan to restore the Gulf of Mexico. On September 28, 2010, Secretary Mabus released a report entitled "America's Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill." The report recommended Congress divert a significant amount of any CWA civil penalties obtained from parties responsible for the DEEPWATER HORIZON oil spill from the OSLTF and deposit them into a Gulf Coast Recovery Fund (GCRF). The GCRF would provide funding for projects which address long-term economic and ecosystem recovery and restoration efforts in the Gulf. The report also recommended Congress authorize a Gulf Coast Recovery Council composed of representatives from federal, state and tribal government to manage the funds and to coordinate projects. Finally, the report recommended that the President immediately establish a Gulf Coast Ecosystem Restoration Task Force to coordinate the recovery of the region's ecosystem.

On October 5, 2010, the President established the Task Force recommended by the Mabus report, to coordinate the long-term conservation and restoration of the Gulf Coast. The Task Force is made up of senior officials from seven cabinet agencies, the Executive Office of the President, and representatives of the five Gulf Coast states. As part of its mandate, it was charged with developing a strategy to drive action and guide long-term collaboration to effectively address and reverse widespread environmental degradation and ensure a healthy environment and economic future for the Gulf. A preliminary strategy was released for public review and comment on October 5, 2011. The final strategy is expected to be released the week of December 5, 2011.

Prior Congressional Action

In the 111th Congress, the House of Representatives passed H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act of 2010 on July 30, 2010, by a vote of 209-193-1. This legislation authorized the creation of a Gulf of Mexico Restoration Task Force for the purpose of coordinating federal, state, and local restoration programs and projects in the Gulf that were impacted by the Deepwater Horizon spill. H.R. 3534 established a new, per-barrel, civil penalty provision within the CWA for releases of oil or hazardous substances in excess of 1,000,000 barrels, and dedicated these penalties towards implementation of restoration activities approved by the Gulf of

Mexico Restoration Task Force. No further action was taken on H.R. 3534 in the 111th Congress.

RESTORE Act

H.R. 3096, the RESTORE Act of 2011, was introduced by Representative Steve Scalise (R-LA) and 24 other bipartisan Members representing Gulf Coast districts. H.R. 3096 has been referred to the Committees on Transportation and Infrastructure, Natural Resources, and Science, Space and Technology. The legislation would:

- Establish a Gulf Coast Restoration Trust Fund (Fund) in the Treasury and requires the Secretary of the Treasury to deposit into the Fund 80 percent of all administrative and civil penalties paid pursuant to a court order, negotiated settlement, or other instrument in accordance with section 311 of the CWA. The other 20 percent would remain in the OSLTF.
- Establish a Gulf Coast Ecosystem Restoration Council (Council) composed of the five federal departmental and agency heads as well as the governors of the five Gulf states.
- Distribute available funds in the Fund as follows:
 - 35% of the total would be allocated in equal shares to the five Gulf Coast States (Florida, Mississippi, Alabama, Louisiana, and Texas). States must spend these funds on economic and ecological recovery activities along the Gulf Coast;
 - 60% of the total would be allocated to the Council. Of that amount:
 - 1/2 (or 30% of the total funds) would be used for the development and implementation of a comprehensive restoration plan.
 - 1/2 (or 30% of the total funds) would be allocated according to an impact driven formula and disbursed to the Gulf Coast States by the Council in response to plans submitted by the Gulf Coast States.
 - 5% would be allocated to a Long Term Science and Fisheries Endowment and Gulf Coast Centers of Excellence program. The programs would advance research, science and technology in the Gulf around specific disciplines including coastal restoration, fisheries research, offshore energy development, sustainable growth and economic development, as well as comprehensive monitoring and mapping of the Gulf.

On July 21, 2011, Senator Mary Landrieu and eight other Senators representing Gulf Coast states introduced S. 1400, legislation similar to H.R. 3690. S. 1400, as amended, was ordered reported favorably by the Committee on Environment and Public Works on September 21, 2011. The Congressional Budget Office estimates that enactment of S. 1400 would increase direct spending by \$1.2 billion over the 2012 to 2021 period.

WITNESSES

Panel I

Gulf Coast Members of Congress

Panel II

Mr. Craig Bennett
Director, National Pollution Funds Center
United States Coast Guard

Mr. Robert Haddad
Chief, Assessment and Restoration Division
Office of Response and Restoration
National Oceanic and Atmospheric Administration

Panel III

Mr. Garrett Graves
Chair
Coastal Protection and Restoration Authority of Louisiana

The Honorable Robert Craft
Mayor
City of Gulf Shores, Alabama

The Honorable Bill Williams
Commissioner
Gulf County, Florida

Mr. Julian MacQueen
Chief Executive Officer
Innisfree Hotels, Inc.

Dr. Robert Weisberg
University of South Florida

Mr. Mike Voisin
Motivatit Seafoods